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NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY SS 203 AND 204 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA650/2021
[2022] NZCA 388

BETWEEN	R (CA650/2021) Appellant
AND	THE QUEEN Respondent

Hearing:	24 February 2022
Court:	Cooper, Peters and Katz JJ
Counsel:	M Zintl for Appellant M A O'Donoghue for Respondent
Judgment:	22 August 2022 at 2:30pm

JUDGMENT OF THE COURT

A The application for leave to appeal is granted.

B The appeal is allowed in part.

C The Crown may not call propensity evidence at trial concerning the offending against M described at [11], or of the offending against E.

D Order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other

publicly available database until final disposition of trial. Publication in law report or law digest permitted.

REASONS OF THE COURT

(Given by Peters J)

[1] The appellant, R, faces trial on eight charges of sexual offending he is alleged to have committed against his 19-year-old stepdaughter, S.

Leave to appeal

[2] R seeks leave to appeal, pre-trial, against a decision of Judge Tompkins of 28 October 2021, in which the Judge allowed an application by the Crown to offer propensity evidence against R at the forthcoming trial.[1]

[3] Leave is sought on the ground that the admissibility or otherwise of the evidence is important to the conduct of the defence.[2] The Crown does not oppose leave and we grant it for the reason R advanced.

Alleged offending

[4] The alleged offending is said to have occurred on 22 and 23 June 2020. By 2020, R, then in his late 60s, had been in a relationship with S's mother for some years. S had recently moved to stay with her mother.

[5] The summary of facts records the alleged offending against S as follows. On the evening of 22 June 2020, when S's mother was at work, R entered S's bedroom, touched S's vagina from outside of her clothes, kissed her forehead, lips and stomach, and restrained S when she tried to escape. R then prevailed upon a frightened S to remove her jeans, then touched her breasts and vagina, penetrated her digitally, and raped her for about 30 minutes. R also alleged put his penis into S's mouth, performed

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1 *R v [R]* [2021] NZDC 21334.

2 *Hohipa v R* [2015] NZCA 73, [2018] 2 NZLR 1 at [25]–[27]; and *Leonard v R* [2007] NZCA 452 at [13]–[15].

oral sex on her and "had sex with [her] from behind". Amongst other things, R also told S not to tell anyone and that he loved her.

[6] R is alleged to have entered S's bedroom again on the morning of 23 June 2020, kissed her on her forehead, again told S that he loved her, and rubbed her vagina from the outside of her pyjamas.

[7] This alleged offending is charged as six charges of indecent assault,[3] one charge of sexual violation by unlawful sexual connection,[4] and one charge of sexual violation by rape.[5]

[8] R does not deny that the acts alleged occurred but contends they were consensual. Alternatively, on the charges of sexual violation, R contends that he had a reasonable belief in S's consent or, on the charges of indecent assault, an honest belief in her consent.

Proposed propensity evidence

[9] The proposed propensity evidence is as follows.

[10] First, in 2005, R was convicted of two charges of indecent assault of his biological daughter, M.

[11] The first offence in relation to M arose from events which commenced in 1995 when M was six and, as we read the summary of facts, continued until 2001 when M turned 12. The relevant part of the summary of facts records that R rubbed the outside of M's vagina with his hand on more than six occasions, and that R, on occasions, rubbed his erect penis on the outside of M's vagina. For this offending R was convicted of an indecent assault on a female under 12 years old.

[12] The second offence in relation to M was in respect of a single event in 2001 when M was 12. R went into M's bedroom when she was asleep, put his hands down

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3 Crimes Act 1961, s 135.
4 Sections 128(1)(b) and 128B.
5 Sections 128(1)(a) and 128B.

her pants, and started stroking the outside of her vagina. For this offending, R was convicted of an indecent assault on a female between 12 and 16 years old.

[13] R was 43 in 1995, and so the age difference between him and M throughout was 37 years. Indeed, the existence of a substantial age difference between R and all the propensity complainants is a notable feature of each of the propensity incidents to which we refer.

[14] The next incident is offending against L. In 2005, R was convicted of indecently assaulting L on numerous occasions between 2002 and 2004, when he was in his early 50s and L was aged 12 or 13. L was a friend of another of R's daughter's, and a regular visitor to R's house at the relevant time. The summary of facts in respect of this offending records that, on occasions when R and L happened to be alone, R blocked L's way out of the room, touched her buttocks, and also placed his hands either up or down L's top and felt her breasts.

[15] Thirdly, in 2006 R was convicted of indecent assault of another of his biological daughters, E, between January 1999 and January 2000. E was aged seven at the time, and R in his late 40s. The summary of facts in respect of this offending records that R had put his hands down E's underwear and began rubbing her genitalia when she was in her parents' bed during the night. E said that R had touched her in similar ways on at least three occasions.

[16] R was sentenced to terms of imprisonment for his offending against M, L and E. The Crown proposes that evidence of the offending be adduced by production of certificates of conviction and an agreed statement of facts.

[17] R appears to have commenced his relationship with S's mother after his release.

[18] In addition to the above, it is intended that G, who is S's older sister and thus another stepdaughter of R, will give evidence that R offended against her in July 2010. G was 14 in 2010. R was 58. R was charged with indecent assault in respect of G's allegations but found not guilty following a jury trial in 2013.

[19] The summary of facts for G's allegation is to the effect that she was home with her mother and siblings one evening when R was staying the night. R is said to have straddled G when she was in bed, ripped and removed her t-shirt, placed a hand over her mouth, slid his other hand under her singlet and bra and to have rubbed and pushed her breasts. R is then said to have put his hand down G's pyjama pants and rubbed the outside of her vagina. R is alleged to have said to G that he would kill her and her mother if G told anyone.

[20] The Crown proposes to adduce G's evidence by calling her as a witness at trial or by playing an evidential video interview of her taken at the time of her complaint.

Decision under appeal

[21] The Judge was satisfied that the proposed propensity evidence demonstrated a tendency by R, when the opportunity arises, to engage in sexual contact with persons with whom he has a familial connection, and their similarly aged friends.[6]

[22] The Judge identified the issues in dispute at trial as being whether S consented to sexual activity with R, and R's reasonable or honest belief in her consent.[7] Mr Zintl, on behalf of R, put it in largely the same way — that is, the issues will be S's consent or lack thereof and whether R may have reasonably or honestly believed that she was consenting. Nothing turns on the minor differences between the two expressions.

[23] The Judge then assessed the probative value of the evidence by reference to the issues in dispute, having regard to the various matters in s 43(3) of the Evidence Act 2006 (Act). The Judge concluded that the probative value of the evidence, which he considered "medium to high",[8] outweighed the risk that the evidence might have an unfairly prejudicial effect on R.[9] The Judge considered that any residual risk as to the latter would be able to be met by warnings from both defence counsel and the trial judge.[10]

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6 *R v [R]*, above n 1, at [23].
7 At [22].
8 At [32].
9 At [38].
10 At [36]–[37].

[24] This is a convenient place to record that it is the responsibility of the trial judge, not counsel, to direct the jury on the relevance of propensity evidence and its permissible use. Although counsel will often address the matter in their closing remarks, the ultimate responsibility lies with the trial judge.

Grounds of appeal

[25] Mr Zintl advances the following grounds of appeal:

(a) The Judge's assessment of the probative value of the evidence as regards the issues in dispute was incorrect. In fact, the probative value of the evidence is low.

(b) The Judge wrongly assessed the probative value of the propensity evidence by "counting up" the similarities.

(c) The probative value of the evidence does not outweigh the risk it may have an unfairly prejudicial effect on R. In particular, the evidence is likely to unfairly predispose the jury against R and the jury will tend to give the evidence disproportionate weight, despite any direction to the contrary.

Assessment of probative value

Nature of issues in dispute: s 43(2)

[26] Mr Zintl submits that the proposed propensity evidence is of low probative value to the issues in dispute because of important differences between the propensity incidents and the offending now alleged. Mr Zintl referred us to this Court's decision in *Omar v R* as an instance in which the same issues were in dispute and this Court held that the probative value of propensity evidence adduced at trial was low.[11]

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[11] *Omar v R* [2021] NZCA 596.

Omar v R

[27] Mr Omar appealed to this Court against his conviction for sexual violation by rape, which he was said to have committed in late 2015. One of Mr Omar's grounds of appeal was that propensity evidence adduced at his trial was wrongly admitted. That evidence comprised two convictions for sexual violation that Mr Omar committed in 2007, and to which he had pleaded guilty.

[28] The nature of the 2007 offending was such that no issue of consent or reasonable belief in consent could arise. In contrast, the issues of consent or Mr Omar's reasonable belief in the same were very much in issue at the trial for the 2015 event.

[29] Having considered the matters in s 43(3), this Court assessed the 2007 convictions as of low probative value, because of the absence of strong linkages to the 2015 event.[12] Having made that assessment, this Court held that the low probative value of the evidence did not outweigh the risk of unfair prejudice, hence the Court's determination that the evidence of the convictions should not have been admitted.[13]

[30] The decision in *Omar* was reached by an orthodox analysis of probative value to issue in dispute, and whether that probative value outweighed the risk of unfair prejudice. It does not stand for the proposition that propensity evidence of the type in issue here can never be of probative value to matters of consent. The short point is that there are obvious differences between that case and this, not least the number of complainants in the present case and that the complainants are all family members of the appellant, other than L.

[31] The issue to be addressed is whether the Judge's assessment in this case was correct, having regard to the matters in s 43(3) of the Act.

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12 At [34].
13 At [37].

Frequency of acts: s 43(3)(a)

[32] Mr Zintl takes no issue with the Judge's assessment that the propensity incidents, by which we mean the offending or allegations referred to in [10]–[19], above, were reasonably frequent.

Connection in time: s 43(3)(b)

[33] Mr Zintl submits that the intervals in time separating the propensity incidents and the offending now charged diminish the probative value of the evidence.

[34] The offending against M, L and E took place between 1995 and 2004 (16 to 25 years prior to the currently alleged offending). The alleged offending against G (in respect of which Mr R was acquitted at trial) took place in 2010, 10 years prior to the currently alleged offending.

[35] A substantial gap in time between the subject offending and the proposed propensity evidence will often be a factor that weighs against the admission of the propensity evidence. The rationale is that the probative value of historical evidence may be reduced because it may be less likely that an offender will act in a similar way many years later.[14] The courts recognise that people may change and mature with the passage of time.

[36] This Court has previously recognised, however, that a weak connection in time between the current charge and proposed propensity evidence may be less influential in the context of sexual offending against children than in other areas of the criminal law. That is because a deviant sexual interest, such as a sexual interest in children, is more likely to be deeply entrenched, and less likely to be affected by the passage of time than many other forms of offending, including violent offending.[15]

[37] Here, we accept that the weak connection in time between the current allegations and the offending against M, L and E is a relevant factor. However, it is

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14 *Howard v R* [2016] NZCA 379 at [15].

15 *F (CA7/2018) v R* [2018] NZCA 100 at [48], citing *Snell-Scasbrook v R* [2015] NZCA 195 at [36]; *R v Hanson* [2005] EWCA Crim 824, [2005] 1 WLR 3169; and *R v Cox* [2007] EWCA Crim 3365 at [29]. See also *Robin v R* [2013] NZCA 105 at [26].

only one factor to be considered in the overall assessment. Further, relative to the other s 43 factors, it is one that carries relatively little weight.

[38] We are not persuaded that the interval in time between the alleged offending against G in 2010 and against S in 2020 is significant. As Mr O'Donoghue, for the respondent submits, this interval is likely to be explained by R having a reduced opportunity to offend, if any.

[39] In 2005 and 2006, R was sentenced to terms of imprisonment totalling three years and six months for the offending against M, E and L. We do not know when R was released or when he commenced his relationship with G and S's mother. However, as we understand S's evidential video interview, she and her siblings were not permitted to stay with their mother after G made her allegations in 2011, when R's history of sexual offending became known.

[40] S also said in her interview that she commenced living at her mother's home in June 2020. If so, the sexual activity that R acknowledges with S occurred no more than three weeks later. This adds force to Mr O'Donoghue's submission that the hiatus reflects a lack of opportunity rather than a loss of inclination.

Extent of similarity between acts, omissions, events or circumstances: s 43(3)(c)

[41] There are some obvious similarities between the propensity incidents and the charged offending.

[42] First, each complainant, bar L, has a familial connection with R. Two are R's daughters, and two are his stepdaughters. L came into R's sphere through her friendship with one of R's daughter's.

[43] Secondly, in each case there has been a substantial difference in age between R on the one hand and those he has or is alleged to have offended against on the other. In the case of M, E, L, and G the difference was between 37 and 44 years. The age difference between R and S was approximately 50 years.

[44] Thirdly, each event, proven or alleged, has involved an indecent assault or assaults at the more serious end of the scale.

[45] As Mr Zintl submits, however, there is a notable difference between the ages of the propensity complainants and S. S was 19 at the relevant time. In contrast, M was six at the time the offending against her commenced, E was seven, L was 12 (as was M at the time of the second offence against her) and G was 14. Mr Zintl submits that the differences in age between S on the one hand, and M, E, L and G on the other, diminish the value of the propensity evidence significantly. He referred us to *R v Elmer* in support of this submission,[16] which we discuss below.

[46] Mr Zintl also submits that the probative value of the propensity evidence is diminished because the alleged offending against S is vastly more serious and invasive.

[47] We agree that the offending against S, if proved, is more serious. However, we do not consider this assists R particularly. As Mr O'Donoghue submits, it may be explained by R having greater or different opportunity in relation to S. Also, as this Court said in *R v Khan*, "[a] difference in the seriousness of offending will not, of itself, outweigh the probative value of the propensity evidence".[17]

Number of complainants making the same or similar allegations and whether those allegations may be the result of collusion or suggestibility: s 43(3)(d) and (e)

[48] Four complainants are making allegations similar to those made by S. There is no suggestion that the allegations are the result of collusion or suggestibility.

Extent to which acts are unusual: s 43(3)(f)

[49] Mr Zintl accepts that sexual offending against children and young persons is highly unusual, but submits the same cannot be said of sexual offending against a 19-year-old. In support of this submission, Mr Zintl referred us to Glazebrook J's

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16 *R v Elmer* [2019] NZCA 470.
17 *R v Khan* [2010] NZCA 510 at [25].

statement in *Vuletich v R*, to the effect that sexual offending against adult women cannot be considered unusual.[18]

[50] Mr O'Donoghue submits that it is the familial connection which renders the offending in this case unusual, and he referred us to three authorities in which this Court or the Supreme Court has confirmed this.[19]

Overall assessment

[51] The similarities to which we have referred in [42]–[44] above give the propensity evidence probative force.

[52] For the reasons set out at [35]–[37] above, we do not consider that the historic nature of the offending against M, L and E materially impacts the probative value of that evidence. Nor are we persuaded that the interval in time between the alleged offending against G in 2010 and against S in 2020 is significant. As noted at [38]–[40] above, this interval is likely to be explained by R having a reduced opportunity to offend, if any.

[53] We do, however, accept that the probative value of the evidence of the first offending against M (which commenced when she was aged six) and the offending against E (when she was aged seven) is diminished by their ages at the relevant time. This Court has previously accepted that offending against children is different to offending against young people or adults. For instance, in *R v Pio* this Court agreed that a sexual interest in a teenage girl, 14 in that case, was to be distinguished from a sexual interest in a pre-pubescent girl of eight.[20] Also, and as Mr Zintl submitted, *R v Elmer* is relevant to the extent this Court said care is required in assessing the relevance of prior sexual offending against a child, 11 in that case, to offending against a young person, a complainant under 16.[21]

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18 *Vuletich v R* [2010] NZCA 102 at [38(f)].
19 *R v K* [2019] NZSC 46, [2019] 1 NZLR 561; *R (CA379/2018) v R* [2019] NZCA 255; and *F (CA7/2018) v R* [2018] NZCA 100.
20 *R v Pio* [2019] NZCA 634 at [17]–[20].
21 *R v Elmer*, above n 16, at [26].

[54] That said, we do not accept the submission that the offending against M and L at 12, and the alleged offending against G at 14, is similarly distinct from that against S at 19. All the complainants were comparatively young and, of course, much younger than R at the relevant time.

[55] Taking these various matters into account, it is our view that the probative value of the evidence of the first offending against M and the offending against E is relatively low. On the other hand, we assess the probative value of the second offending against M, the offending against L, and the alleged offending against G, as being fairly high.

Risk of unfairly prejudicial effect on the defendant

[56] Propensity evidence may only be offered if its probative value outweighs the risk it may have an unfairly prejudicial effect on R.[22] In assessing that prejudicial effect, it is necessary to consider whether the evidence is likely to unfairly predispose the fact-finder against R, and whether the fact-finder will tend to give the evidence disproportionate weight in reaching a verdict.[23]

[57] Mr Zintl submits the evidence of R's offending against M and E is likely to unfairly predispose the fact-finder against R due to the "instinctive distaste for sexual offending by a father against his own biological daughters". Mr Zintl submits that neither judicial direction nor presentation of the evidence by way of an agreement under s 9 of the Act would ameliorate this risk sufficiently.

[58] Mr Zintl also submits that the risk of an unfairly prejudicial effect is increased by the fact G will have to give evidence at trial as her allegations resulted in an acquittal.

[59] Mr O'Donoghue submits that any risk of unfair prejudice is able to be met by tailored propensity directions from the trial Judge.

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22 Evidence Act 2006, s 43(1).
23 Section 43(4).

Assessment

[60] We begin by stating there is nothing in Mr Zintl's last submission summarised at [58] above for the reasons given by the Supreme Court in *R v K (SC10/2019)*.[24]

[61] We have assessed the probative value of the evidence of the first offending against M (commencing when she was aged six) and the offending against E (aged seven) as being relatively low. Given their very young ages at the time of the offending there is, in our view, a clear risk that admission of this evidence could unfairly predispose the jury against R. Accordingly, that evidence is inadmissible on the basis that its probative value does not outweigh the risk it may have an unfairly prejudicial effect on R.

[62] On the other hand, we have assessed the probative value of the second offending against M (when she was aged 12), the offending against L (aged 12 or 13), and the alleged offending against G (aged 14) as being fairly high. We do not accept Mr Zintl's submission that all the evidence relating to M should be excluded on the basis that its admission is likely to *unfairly* predispose the fact-finder against R due to the "instinctive distaste for sexual offending by a father against his own biological daughters". The relevant propensity in this case is a tendency by R, when the opportunity arises, to engage in sexual contact with persons with whom he has a familial connection, and their similarly aged friends. It is relevant, and not unfairly prejudicial, that M is R's daughter.

[63] In our view the significant probative value of the proposed propensity evidence relating to the second offending against M, the offending against L, and the alleged offending against G outweighs any risk that such evidence could have an unfairly prejudicial effect on R. The evidence is accordingly admissible.

Result

[64] The application for leave to appeal is granted.

[65] The appeal is allowed in part.

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[24] *R v K (SC10/2019)*, above n 19. See also *R (CA379/2018) v R*, above n 19.

[66] We order that the Crown may not call propensity evidence at trial concerning the offending against M described at [11], or of the offending against E.

[67] To protect the appellant's fair trial rights, we make an order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other publicly available database until final disposition of trial. Publication in law report or law digest permitted.

Solicitors:
Crown Solicitor, Nelson for Respondent